IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.K.MOHANAN

MONDAY, THE 12TH NOVEMBER, 2007 / 21ST KARTHIKA, 1929

Crl.MC.No. 3445 of 2004 (A)

(SC.231/2003 of ADDITIONAL DISTRICT AND SESSION'S COURT, KALPETTA)

PETITIONER/2ND ACCUSED:

VIJESH KUMAR, SON OF VASUDEVAN NAMBIAR,
LAKSHMI NIVAS, PADINHARATHARA P.O.,
PAZHUTHARA (VIA), WAYANAD DISTRICT.

BY ADV. SRI.SARVOTHAMAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.M.KAMMAPPU.

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 12/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V.K.MOHANAN, J.

Crl.M.C.No. 3445 of 2004 - A

Dated this the 12th day of November, 2007

O R D E R

The petitioner herein, who is the second accused in S.C.No.231 of 2003 on the file of the Additional District and Sessions Court, Kalpetta, approached this Court under Section 482 of the Code of Criminal Procedure to quash all the proceedings pending against him before the court below since, according to the petitioner, no offence will lie against him.

2. The prosecution allegation is that at about 9.30 a.m. on 14.3.2001, the first accused was seen in possession of ten bottles of 500 ml. of old Port XXX Rum (totalling 5 litres) which is an Indian Made Foreign Liquor, while travelling in a Taxi Autorickshaw driven by the petitioner from Kalpetta to Padinharathara. It is alleged that when the above vehicle driven by the petitioner reached the 8th Mile Road Junction at Kavumannam, the police officials attached to Padinharathara Police Station intercepted, stopped the vehicle and questioned the first

accused, and the contraband article was seized from his possession and Crime No.15 of 2001 of Padinharathara Police station was registered for the offence under Section 55(a) of the Abkari Act (for short 'the Act'). After investigation, a final report was filed and on the basis of that, S.C.No.231 of 2003 was instituted after having taken cognizance. It is at this stage the petitioner herein approached this Court with the above prayer. It appears that the above M.C. came up for admission on 15.12.2004 and the proceedings in the court below is stayed as per the order dated 15.12.2004.

3. It is contended by the petitioner that he is only an autorickshaw driver and his vehicle was hired by the first accused and as usual, he plied the vehicle from Kalpetta to Padinharathara and he was not aware of the contents and nature of the goods or cover possessed by the first accused who hired the vehicle. It is also stated

that what can be gathered from the prosecution case is that the accused were found in possession in excess of permissible quantity of Indian Made Foreign Liquor. It is also stated in the Criminal M.C. that the total quantity seized is 5 litres and as per the rules, the maximum liquor that can be possessed by a person is 2.5 litres and if the total quantity seized is apportioned to the two accused, the total possessed per head will be only 2.5 litres and therefore, according to the petitioner, no offence is made out and hence, he is entitled to an order quashing the proceedings pending against him. It is also averred in the M.C. that even according to the Police, there is no material to show that the said quantity of Indian Made Foreign Liquor was transported for the purpose of sale.

4. I have heard the learned counsel for the petitioner as well as the Public Prosecutor.

5. Sri.K.P.Sarvothaman, learned counsel appearing for the petitioner has strenuously argued that the petitioner is innocent and he happened to be the driver of the autorickshaw which is hired by the first accused from Kalpetta to Padinharathara. He had very much argued that there is no material to gather any inference that the petitioner has possessed the contraband article. It is also argued that the contraband article was seized from the possession of the first accused and there is no material to attribute any role to the petitioner for committing the above offence. The learned counsel, based on the decision reported in **Sabu** v. **State of Kerala** (2003(2) KLT 173), vehemently argued that no offence under Section 55(a) of the Act will lie against the petitioner since the seized article is not an illicit liquor, but liquor which is permitted by law and therefore, it is submitted that the petitioner is

entitled to get quashed the proceedings pending against him in the court below.

6. Opposing the arguments raised by learned counsel for the petitioner, the Public Prosecutor submits that the trial is yet to be started and all these contentions can be considered at the time of trial. The learned Public Prosecutor has specifically stated that at the time of commission of the offence, the permissible quantity was only 1.5 litres and not 2.5 litres as claimed by the petitioner. Therefore, according to the learned Public Prosecutor, the petitioner is not entitled to get an acquittal on the ground that he was in possession of only permissible quantity.

7. Along with the Criminal M.C., the petitioner has produced a copy of the final report as Annexure-I, and a copy of the 161 statement of two charge witnesses as Annexure-II and Annexure II(a). Annexure-III is the

F.I.R. The learned counsel took me through the various documents produced along with the M.C. and submits that even going by the final report, no offence will lie against the petitioner and therefore, there is no meaning in compelling him to undergo the trial. It is true, even as per the prosecution case, the material which is seized from the possession of the first accused is only an Old Port XXX Rum which is an Indian Made Foreign Liquor, alleged to have purchased from Kulathinkal Brandy Shop at Kalpetta. Even as per Annexure-III FIR, the said contraband article was seized from the possession of the first accused, who purchased it from the above shop which was meant for sales at Padinharathara area. Even as per Annexure-I final report, the seized article is old Port XXX Rum which is an Indian Made Foreign Liquor. In the light of the above factual situation, the learned counsel appearing

for the petitioner submits that no offence under Section 55(a) of the Act will lie against the petitioner and at the most, only Section 63 of the Act can be attributed. In support of the above contention, the learned counsel placed reliance on the Sabu's case (cited supra). The learned counsel took me through the above decision. In para 5 of the above decision, it is stated as follows:-

> "5. There is no case for the prosecution that accused were transporting illicit liquor or they have illegally imported the liquor or the liquor was adulterated or they have manufactured the liquor or liquor was transported for illegal second sale. Therefore, the words, import, export, transport, transit or possession of liquor read with heading to the section show that it is applicable to illegal liquors. Here, the liquor was purchased from the Kerala State Bewerages Corporation for own consumption and there is no question of any illegal import or transporting or possessing illicit liquor. The only offence is that they were in possession of excess quantity of liquor, permissible under law though purchased legally from the Kerala State Bewerages Corporation."

Thus, according to the counsel, the petitioner is not liable to be prosecuted for offence under Section 55(a) of the Act since the prosecution has no case that the petitioner had committed the offence of transporting illicit liquor or illegally imported the liquor or the liquor was adulterated or they have manufactured the liquor or liquor was transported illegally for second sale. In the above decision, this Court held "the only offence is that they were in possession of excess quantity of liquor, permissible under law, though purchased legally from the Kerala State Bewerages Corporation". In the present case, the factual footing of the prosecution case is not much different from the above decision. Here the allegation is that the first accused had purchased ten bottles of 500 ml. old Port XXX Rum (total 5 litres) from a recognised shop at Kalpetta for the purpose of sale at

Padinharathara. Even, according to the learned Public Prosecutor, the permissible quantity on the date of occurrence was 1.5 litres. It is also brought to my notice that now the permissible quantity is 3 litres. Thus, it can be seen that in the present case, even according to the prosecution, the accused were found in possession of excess quantity of Indian Made Foreign Liquor than what is permissible by rule. Therefore, I am of the view that the decision cited supra is fairly applicable in the facts and circumstances of the case, and therefore, there is no meaning in compelling the petitioner to undergo the ordeal of trial for the offence under Section 55(a) of the Act. Of course, if the petitioner is found guilty under Section 63, at the end of the trial, as done in the above reported decision, he can be sentenced in accordance with Section 63 of the Act. But, considering the stage of the case, now it cannot be said that whether he had

committed that offence or not. Therefore, according to me, the entire prosecution proceedings against the petitioner cannot be quashed at this stage. Of course, all the contentions raised by the petitioner can be raised at the time of framing of the charge and if so, the court shall consider such contentions, especially in the light of the decision reported above and in the light of the observations made by me, and frame a proper charge in accordance with law.

8. In the light of the above discussion and observation, this Criminal M.C. is disposed of with a direction to the court below to frame proper charge, especially in the light of Sabu's case (cited supra) and on the basis of the above discussions, after having heard the petitioner herein and on considering all the contentions on merit. The petitioner is at liberty to raise all these contentions at the time of framing the charge.

Counsel for the petitioner submits that he may be directed to be exempted from his personal appearance in the court below. No doubt the court below will consider such request at appropriate time and for sufficient reasons.

V.K.MOHANAN,
Judge

Mbs/

V.K.MOHANAN, J.

O.P.NO. OF 2001

J U D G M E N T

DATED: -0-2007